NO. 82-1295

IN THE

Supreme Court of the United States

October Term, 1982

ESCAMBIA COUNTY, FLORIDA, et al.,

Appellants,

v.

HENRY T. McMILLAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, IN SUPPORT OF THE APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION

Comes now the above listed organization, by counsel, and moves the Court for leave to file a brief amicus curiae, in support of the appellees in the above-styled cause.[1]

1. Counsel for the appellants has declined to consent to the filing of this brief.

The American Civil Liberties Union is a nationwide membership organization with over 250,000 members. It has a long-standing concern with promoting equality of the franchise, both through the fourteenth and fifteenth amendments and federal statutory guarantees such as Section 2 of the Voting Right Act of 1965.

Attorneys for the American Civil Liberties Union have provided representation in voting rights cases throughout the country, and since 1965 the American Civil Liberties Union Foundation has maintained a Southern Regional Office which operates a Voting Rights Project, the primary goal of which is to provide representation for those citizens historically denied equal access to the manner in which our representatives are selected to govern.

Because of its concerns over

equality in voting, amicus seeks leave to file this Brief of Amicus Curiae.

Respectfully submitted,

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SUMMARY OF ARGUMENT

This Court should affirm the judgment below on the basis that as a result of the use of at-large elections in Escambia County, Florida, the political process is not equally open to blacks in violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, as amended by Pub.L.No. 97-250, §3, 96 Stat. 131, 134 (1982). This statute, as amended during the pendency of this case, is applicable on direct appeal. See Cross v. Baxter, ___U.S.___, 103 S.Ct. 1515 (1983). The statutory claim should be resolved before, and if possible without reaching, the constitutional issue in accordance

with this Court's practice and policy against deciding constitutional questions unnecessarily. New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979). Section 2, as amended, is aimed specifically at the type of case at issue here. H.R. Rep. No. 227, 97th Cong., 1st Sess. 28-29, n.94 (1981).*

Congress amended §2 of the Voting Rights Act in 1982 to ensure that the statutory standard for proving a violation be less burdensome and more objective than the requirements to prove discrimination in voting under the Constitution. The legislative history makes clear that under §2 plaintiffs do not need to prove discriminatory intent or purpose, but only that a challenged practice has discriminatory results. S.Rep. No. 417, 97th Cong., 2d Sess. 2, 16, 27-30, 67-68 (1982).*

*Hereinafter "House Rep." and "Senate Rep." respectively.

The §2 prohibition is broad, based on a functional view of the political process and applies to all forms of discrimination. Under a §2 analysis, unresponsiveness of elected officials is not to be weighed as a factor because it is too subjective. Election of black officials does not preclude existence of a violation of §2. Forseeability of the consequence of defendants' actions, disproportionate minority representation, past discrimination, and a low socio-economic condition of minorities are relevant evidence when a plaintiff is establishing a §2 violation. Id. at 28-30.

The findings of the courts below establish that the at-large election system for the Escambia County Board of Commissioners has discriminatory results and denies blacks equal access to the political process. This Court should not

disturb the findings of two federal courts, Neil v. Biggers, 409 U.S. 188, 193, n.3 (1972), and should affirm the judgment below pursuant to 42 U.S.C. §1973, as amended in 1982.

ARGUMENT

I. The judgment below should be affirmed on the basis that as a result of the use of at-large elections for the Board of County Commissioners in Escambia County, Florida, the political process is not equally open to black voters in violation of §2 of the Voting Rights Act of 1965, as amended in 1982.

The district court, in its July 10, 1978 decision on the merits, held that plaintiffs-appellees had established a violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, as well as the fourteenth and fifteenth amendments. McMillan v. Escambia County, Florida, PCA No. 77-0432 (N.D. Fla. July 10, 1978); Jurisdictional Statement, 71a, 100-101a (hereinafter JS, ___)[1]. The court of

1. Citations to JS, 1a-29a are to the court of appeals' opinion as reproduced in the appendix to the Jurisdictional Statement. The published opinion may be found at 688 F.2d 960 (5th Cir. 1982). Citations to JS, 71a-115a are to the unpublished district court opinion.

appeals reversed, both as to the statutory and constitutional violations, relying upon the intervening decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). McMillan v. Escambia County, Florida, 638 F.2d 1239 (5th Cir. 1981), JS, 30a-51a, 38a, n.9. It concluded that the evidence fell short "of showing that the [county commission] 'conceived or operated [a] purposeful [device] to further racial discrimination,'" quoting City of Mobile v. Bolden, 446 U.S. at 66, quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). JS, 43a. Appellees petitioned the court for rehearing and rehearing en banc. JS, 2a.

Subsequently, on June 29, 1982, Congress amended §2 to provide that election practices are unlawful under the statute if they have the "result" of

discriminating on the basis of race or color without regard to proof of discriminatory purpose. Pub.L. No. 97-205, §3, 96 Stat. 131, 134 (1982). The text of §2, as amended is attached hereto as Appendix A. Two days later, on July 1, 1982, this Court decided Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982), which held that discriminatory purpose need not be proved directly, but could be inferred from circumstantial evidence and the relevant fact of the particular case:

> [D]iscriminatory intent need not be proven by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts,..." [Washington v. Davis, 426 U.S. 229, 242 (1976)]. Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence as may be available." Arlington Heights [v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)].

102 S.Ct. at 3276.

The court of appeals subsequently granted appellees' petition for rehearing, vacated its earlier decision, and affirmed the district court, holding that the at-large method of electing the Board of County Commissioners was unconstitutional:

> The evidence in the record fully supports the district court's subsidiary findings. The court relied upon the aggregate of these findings involving Zimmer factors and other evidence in determining that the at-large system in Escambia County is being maintained for discriminatory purposes.

JS, 21a-22a.

As to the §2 claim, the court of appeals stated that appellees had "presented a cogent argument that the amended Act entitles them to relief," JS, 4a, n.2, but it declined to decide the case on statutory grounds for the reason that it would result in further unnecessary,

undersirable delay without affecting the outcome.

> Resolution of these issues could result in further delay and disruption of the electoral process in Escambia County. Moreover, the decision of these issues would not affect the outcome of this case because we hold...that appellees are entitled to relief on their fourteenth amendment claim.

JS, 5a, n.2.

Amicus contends that, while the court of appeals properly affirmed the finding of the district court in light of Rogers v. Lodge, supra, the decision below should be approved on the basis of amended §2 without reaching the constituional issue.

> A. This Court should decide this case by relying on the applicable statute and should avoid an unnecessary examination of the constitutional standard of proof required in a vote dilution case.

This Court has repeatedly held that statutory issues should be resolved at

the outset and that the determination of constitutional questions should be avoided unless necessarily reached. New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936). Although the court of appeals did not decide the amended §2 issue, JS, 3a-5a, this Court is "not...foreclosed from considering the statutory question merely because the lower court failed to address it." United States v. Clark, 445 U.S. 23, 27 (1980) (citations omitted); New York City Transit Authority v. Beazer, supra, 440 U.S. at 583, n.24. For the reasons below, this Court's consideration of the statutory issue should be dispositive of this case, thus avoiding the need for deciding the

constitutional issue.[2]

The legislative history of amended §2 leaves no doubt as to Congress' intent that the new legislation should "apply to pending cases in accordance with the well-established principles of Bradley v. City of Richmond, 416 U.S. 696 (1974) and United States v. Alabama, 362 U.S. 602 (1960)." 128 Cong. Rec. S7095 (daily ed. June 18, 1982)(remarks of Sen. Kennedy, Senate Floor Manager); 128 Cong. Rec. H3841 (daily ed. June 23, 1982)(remarks on Rep. Sensenbrenner, House Floor manager).[3] In addition, the legislative history indicates that Congress had the

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2. Congress specifically provided that a private right of action exists to enforce amended §2. Senate Rep. at 30; House Rep. at 32.

3. As a general matter, this Court has held that new legislation, as well as new constitutional interpretations, are applicable to cases pending on appeal. The rule is that "a court is to apply the law in effect at the time
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kind of case sub judice expressly in mind when it amended §2. For example, the House and Senate reports cited the court of appeals' first decision (which did not find a violation as to the system of electing Escambia County Commissioners, but which did find a violation as to the method of election of the Escambia County School Board and City of Pensacola Council) as examples, which it intended to address and correct, of: (1) the confusion surrounding the original §2

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it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711 (1974); accord, United States v. Alabama, 362 U.S. 602, 604 (1960); Hutto v. Finney, 437 U.S. 678, 694, n.23 (1978). Here, of course, the legislative history is explicit, and application of §2 to this case would promote congressional and public policy of non-discrimination in the electorate.

standard of proof, House Rep. at 28-29, n.94; (2) a case involving subtle and hidden racial motivations, House Rep. at 31, n.106; and (3) the heavy burden of proof placed on plaintiffs by City of Mobile, supra. Senate Rep. at 37-38 and n.138.

In comformity with the legislative history, this Court has consistently applied amended §2 to pending cases. See Cross v. Baxter, ___U.S.___, 103 S.Ct. 1515 (1983); City of Lockhart v. United States, ___U.S.___, 103 S.Ct. 998 (1983); and, Brooks v. Winter, ___ U.S. ___, 103 S.Ct. 2077 (1983).[4]

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4. In neither Cross, City of Lockhart nor Brooks did the lower courts, as here, make detailed findings of vote dilution. Thus, remand, while proper in those cases, is inappropriate here where the issues are whether the finding of dilution of the lower courts is sustainable, and whether the basis of this Court's decision should be statutory or constitutional.

The statute, designed as it was to apply to cases such as this, furnishes a basis for decision without requiring the Court unnecessarily to reach the broader constitutional questions involved.

B. Section 2 of the Voting Rights Act, as amended in 1982, embodies a different standard of proof than for a constitutional violation.

Congress, pursuant to its broad remedial powers to enforce the fourteenth and fifteenth amendments, and in response to City of Mobile v. Bolden, supra, amended §2 of the Voting Rights Act to provide an independent cause of action for denial of equal voting rights.[5]

5. The Senate as a whole adopted the version of the Act reported out of the Committee on the Judiciary, which was in turn adopted in whole by the House of Representatives, with the understanding that the effect of the §2 amendment was identical under either the original House bill or the Senate bill. 128 Cong. Rec. H3839-46 (daily ed. June 23, 1982).

Differences in claims under the statute and the constitution include:

1. Proof of discriminatory purpose is not required for a statutory violation, regardless of the standard of proof necessary to establish a violation of the constitution. Senate Rep. at 2, 16, 27-30, 67-8; House Rep. at 2, 28-32. Compare, City of Mobile, supra, 446 U.S. at 67 (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) that "proof of racially discriminatory purpose is required to show a violation of the Equal Protection Clause"), and Rogers v. Lodge, supra, 102 S.Ct. at 3275-76, n.6 (noting that the plurality in City of Mobile held that the fifteenth amendment prohibition was limited to purposeful discrimination, but expressing no further view on the issue).

Amended §2 prohibits any voting procedure which results in a denial or abridgment of the right to vote on account of race, color, or membership in a language minority. The Senate explained that it "had amended §2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pre-Bolden results test." Senate Rep. at 16.[6]

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6. The Senate, in adopting language directly from White v. Regester, 412 U.S. 755 (1973), in subsection (b) of §2, explained that it was adopting its understanding of the White, or pre-Bolden, results test, but that in any event, the "specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." Senate Rep. at 28 (footnote omitted). Consistent with Congressional understanding of the pre-Bolden results test, both houses indicated that amendment of §2 was appropriate "to restate Congress' earlier intent that violation of the Voting Rights Act, including §2, could be established by showing the
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Although in Rogers v. Lodge the standard of proof established in City of Mobile was relaxed and this Court recognized that intent could be inferred from circumstantial evidence, 102 S.Ct. at 3276, the standard of proof under §2 was still less burdensome that than under the Constitution because "a finding of the appropriate factors showing current dilution is sufficient, without any need to decide whether those findings, by themselves, or with additional circumstantial evidence, also warrant an inference of discriminatory purpose." Senate Rep. at 28, n.112.[7]

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discriminatory effect of the challenged practice." House Rep. at 29 (footnote omitted). Senate Rep. at 16.

7. Lower court decisions applying the new amended §2 standard include Taylor v. Haywood County, Tenn., 544 F.Supp. 1122, 1133-34 (W.D. Tenn. 1982) (granting motion for preliminary

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2. The §2 prohibition against discrimination extends to a broad range of practices, including vote dilution, and is not limited in scope as constitutional guarantees may be.[8] The Senate

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injunction, in part because of plaintiff's likelihood of success under §2 test and distinguishing results test of amended §2 from the §2 standard discussed in City of Mobile); and City of West Helena v. Perkins, 675 F.2d 201, 217 (8th Cir. 1983) (finding at-large elections for West Helena, Arkansas to be in violation of §2). Also see F. Parker, The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va.L.Rev. 715 (1983).

8. As the court of appeals below noted, amended §2 "encompasses a broader range of impediments to minorities' participation in the political process than those to which the Bolden plurality suggested the original provision was limited." JS, 3a-4a, n.2.

directly addressed this distinction, commenting that:

> for purposes of Section 2, the conclusion in the Mobile plurality opinion that "there were no inhibitions against Negroes becoming candidates, and that, in fact, Negroes had registered and voted without hindrance," would not be dispositive. Section 2, as amended, adopts the functional view of "political process" used in White rather than the formalistic view espoused by the plurality in Mobile. Likewise, although the plurality suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged") this section without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote.

Senate Rep. at 30, n.120; cf., City of Mobile, 446 U.S. at 65, and Rogers v. Lodge, 102 S.Ct. at 3276, n.6. The House of Representatives specified that

the §2 prohibition was "intended to include not only voter registration requirements and procedures, but also methods of election and electoral structures, practices and procedures which discriminate." House Rep. at 30-31, citing to Allen v. State Board of Elections, 393 U.S. 544, 569 (1969).

3. Section 2 "avoids highly subjective factors such as responsiveness of elected officials to the minority community" in determining a violation of voting rights, because "[u]se of this criterion creates inconsistencies among court decisions on the same or similar facts and confusion about the law among government officials and voters." House Rep. at 30. "[D]efendants' proof of some responsiveness would not negate plaintiff's showing...that minority voters nevertheless were shut out of

equal access to the political process." Senate Rep. at 29, n.116. However, in constitutional cases, unresponsiveness may be "an important element...in determining whether discriminatory purpose may be inferred." Rogers v. Lodge, supra, 102 S.Ct. at 3280, n.9.[9]

4. Forseeability of the consequences of defendants' actions is "quite relevant evidence" when a plaintiff is establishing a violation of §2, Senate Rep. at 27, n.108 (citing Dayton Board of Education v. Brinkman, 443 U.S. 526, 536, n.9 (1976)), although apparently not significant in a constitutional case. City of Mobile, 446 U.S. at 71-72, n.17.

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9. In Rogers, this Court modified the court of appeals' holding that proof of unresponsiveness was an essential element of vote dilution claims under the fourteenth amendment. 102 S.Ct. at 3280, n.9.

Congress, in sum, not only indicated that plaintiffs need not show a racial purpose to prevail under §2, but it provided that the §2 test be less burdensome on plaintiffs and, as appears more fully infra, at p. 35, n.11, more objective than the constitutional analysis.

C. The opinions of the two federal courts below support the finding of a violation of §2.

The evidence upon which the district court based its finding that the at-large election system in Escambia County was unconstitutional and in violation of the original §2 of the Act, included nearly all of the factors listed by Congress as typical of those that plaintiffs could show to establish a violation of the new results standard of amended §2. The court of appeals concurred in the district court's findings of fact, stating that "the evidence in the record fully supports the district court's subsidiary findings." Js, 21a. Such "findings of fact concurred in by two lower courts" should not be reversed "unless shown to be clearly erroneous." Neil v. Biggers, 409 U.S. 188, 198, n.3 (1972); see also,

Rogers v. Lodge, 102 S.Ct. at 3279.

The courts below based their findings on the totality of the circumstances and specifically relied upon factors which Congress identified in the legislative history as showing a violation of amended §2:

1. History of discrimination. Congress stated that one factor supporting a §2 violation is a "history of discrimination affecting the right to vote." House Rep. at 30; accord, Senate Rep. at 28. In the instant case, the district court found, and the court of appeals specifically considered and affirmed these findings, such a history in a review of the methods by which the members of the board of county commissioners have been selected. JS, 16a-17a; 74a-77a. The courts noted that the system had its "genesis in the midst of a con-

certed state effort to institutionalize white supremacy." JS, 16a; 74a. The lower courts found that the governor of Florida appointed the county commissioners from 1868 to 1901 in order to prevent majority black counties from electing blacks. Id. Other statewide actions affecting blacks' right to vote which the courts recognized were: the institution of a poll tax in 1889, passage of Jim Crow laws beginning in 1900, and the exclusion of blacks from the Democratic Party at the same time. JS, 16a; 74a-75a. The courts found that the at-large election of county commissioners was permitted in 1901 after "enough blacks were disenfranchised" and single-member district primaries were instituted in 1907 under the white primary system. Id. The district court stated that "the resulting anomaly between having district

primary elections and at-large general elections worked, not surprisingly, to the unique disadvantage of blacks.... In effect, the white primary was the election." JS, 75a. The courts noted that after the white primary was struck down by the state courts in 1945, the primary system was eventually changed from district to at-large. JS, 17a; 75a-76a. Finally, the district court found further support for its findings in the county commissioners' recent rejection of a committee's recommendation to submit to the voters a proposal to change to single member districts. JS, 77a.

The lower Courts also found a history of discrimination in education and employment and a low socio-economic status of blacks, factors recognized by Congress as hindering blacks' participation in the political process. Senate

Rep. at 28-29. The district court declared that:

> State enforced segregation and discrimination have helped create two societies in the city and county - segregated churches, clubs, neighborhoods and, until a few years ago, schools. These laws left blacks in an inferior social and economic position, with generally inferior education. The lingering effects upon black individuals, coupled with their continued separation from the dominant white society, have helped reduce black voting strength and participation in government.

JS, 86a; JS 17a-18a.

2. Disproportionate number of minority officeholders. The fact that members of a racial minority have "not been elected in numbers equal to the group's proportion of the population... would be highly relevant" according to the legislative history of §2. House Rep. at 30; accord, Senate Rep. at 29. The district court below found that "[a]lthough blacks constitute 20% of the

county's population and 17% of its registered voters, no black has ever been elected under the county's...at-large election systems. Blacks have run time and again, and always lost." JS, 80a; JS, 13a-14a.

3. Racially polarized voting. The extent to which voting is racially polarized is a factor upon which plaintiffs can rely in part to establish a §2 violation. House Rep. at 30; accord, Senate Rep. at 29. The district court here found that there is a pattern of consistent racially polarized voting in Escambia County, which once resulted in a candidate from the county's active Ku Klux Klan receiving 3,000 votes in an election. JS, 80a. The court of appeals summarized the statistical findings concerning the county commission elections set forth in Appendix A to the

district court's opinion explaining that the "R^2 coefficient, which reflects the percentage of variation in the vote attributable to the race of the registered voters in the races in which black candidates ran, ranged from .85 to .98." JS, 14a, n.12, 107a. The courts found that "the numerical minority of blacks coupled with the white bloc vote prevented blacks from attaining a majority of votes in the county." JS, 14a.

4. At-large elections. The legislative history of §2 makes it clear that "[n]ot all at-large election systems would be prohibited under [the §2] amendment," but the listed factors to consider in the aggregate include "discriminatory elements of the electoral system such as at-large elections." House Rep. at 30. The district court below found that the five commissioners in Escambia County are

"elected at-large by the qualified voters of the entire county." JS, 73a, 3a. In addition, if a candidate is a member of a major political party, he or she must run at-large in a party primary for the nomination. Id.

5. Majority vote requirement. Congress' list of factors relevant to the establishment of a §2 violation included the presence of a majority vote requirement. House Rep. at 30; accord, Senate Rep. at 29. The district court found that the party primaries, which major political parties are required to hold, include majority vote requirements. JS, 73a, 3a. The courts further observed that although there is not such a requirement for the general election, "as a practical matter, no one has in recent history won a general election without a majority." JS, 5a, n.3, 87a.

6. Unusually large election districts.

The extent to which a county uses unusually large election districts is one of the factors to weigh in a §2 analysis. Senate Rep. at 29. The district court observed that the county commissioners "are elected at-large by the qualified voters of the entire county. Thus, they must each run for office in a single district covering approximately 657 square miles (fifty-one miles in length) with a population of 205,334 in 1970 and a projected population of 269,508 in 1980." JS, 73a. The district court characterized this as a large election district and considered it as an enhancing factor which increases the tendency of at-large elections to dilute blacks' voting strength. JS, 87a, 20a-21a.

7. Numbered posts. The legislative history of §2 indicated that the existence of numbered posts in an electoral system

enhances the opportunity for discrimination. House Rep. at 30. The district court noted that candidates for the board of county commissioners "run for numbered places. This means that blacks are always pitted in head-on-head races with white candidates, and that the black community cannot concentrate its votes in a large field of candidates." JS 87a-88a, 21a. The candidates in party primaries also run for numbered places. JS, 73a.

8. Tenuous state policy. Included in the legislative history as an additional factor that has probative value in a §2 case is "whether the policy underlying the...use of such voting...procedure is tenuous." Senate Rep. at 29. The courts below clearly stated that they "found the policy behind the at-large system for electing County Commissioners tenuous." JS 19a, 86a. They found

racial motivations connected with the at-large requirements and, in their analysis of the constitutional claim, found purposeful discrimination in the maintenance of the system. JS, 21a-22a, 99a-100a.

9. Failure to win party nomination. Another factor for courts to consider is "the failure of minorities to win party nomination." House Rep. at 30. The courts below found that "[n]one of the blacks who ran [for county commission] was able to obtain the majority of votes necessary to win the Democratic primary." JS, 14a.

10. Prohibitions on single-shot voting. Congress stated that the existence of prohibitions on single-shot voting was a relevant factor in a §2 analysis. House Rep. at 30; accord, Senate Rep. at 29. Although the courts

recognized that there was no anti-single-shot requirement in the Escambia County election system, they did observe that numbered posts operate to prevent blacks from concentrating their votes in a large field of candidates, a result similar to that under anti-single-shot provisions. JS, 21a, 87a-88a. In addition, the courts found that the five county commissioners are elected to staggered terms. JS, 3a, 73a. This technique also achieves the same goal as anti-single-shot provisions by preventing blacks from concentrating their votes in multi-seat races on one candidate, since fewer seats are filled in any single election.[10]

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10. For a further explanation of the goal of anti-single-shot provisions see Parker, The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va.L. Rev. 715, 717, n.15 (1983).

11. Other Relevant Factors. Congress made clear that the factors showing a §2 violation listed in the legislative history were not exclusive, but that other factors depending upon the circumstances of a particular case could be relevant evidence of prohibited dilution. Senate Rep. at 29. One such factor found by the courts here was a filing fee of approximately $1,000, which the courts concluded had a deterrent effect on minority candidacy. JS, 17a, 80a.[11]

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11. The two courts below, although they found unresponsiveness of the county commissioners in their failure to appoint blacks to advisory boards and in their housing policy, JS, 18a, n.16; 84a-85a, concluded that the commissioners were responsive "by and large." JS, 85a. The reports of both houses indicate, however, that while a significant lack of responsivenss of elected officials to minority needs may be some evidence of a §2 violation, unresponsiveness is generally to be avoided in resolving §2 claims, because it is an overly subjective, unreliable factor and leads to inconsis-
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Virtually all of the objective factors identified by Congress as showing a violation of amended §2 were found by the lower courts in this case.[12] In addition, the district court also found that discriminatory intent was a motivation in the maintenance of the at-large system for electing county commissioners. JS, 96a. The court of appeals, after an initial decision to the contrary, supra,

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tent decision-making in cases presenting analogous facts. House Rep. at 30; Senate Rep. at 29, and n.116.

12. The only factors listed in the legislative history not expressly found by the courts below were discriminatory slating and racial appeals in campaigns. Senate Rep. at 29. Giving the overwhelming evidence of vote dilution, however, and the admonition in the legislative history against "point counting," the absence of these factors cannot be deemed significant in the totality of circumstances of this case. House Rep. at 30; Senate Rep. at 29.

pp. 5-8, affirmed the district court's inference of intentional discrimination and held the electoral system to be unconstitutional. JS, 13a, 29a. An election system which is maintained because of purposeful discrimination violates amended §2 as well. Congress ensured that the "alternative standard of proving that a voting practice or procedure is unlawful if a discriminatory purpose was a motivating factor would still be available to plaintiffs in such cases." House Rep. at 30, n.101.

CONCLUSION

For the foregoing reasons, this Court should (1) address plaintiffs' statutory claim under §2 of the Voting Rights Act of 1965, as amended; (2) defer to the district court's findings of fact "representing as they do a blend of

history and an intensely local appraisal," White v. Regester, 412 U.S. 755, 769-70 (1973); (3) adhere to the "two court rule," under which "the Court does not lightly overturn the concurrent findings of fact of two lower federal courts," Neil v. Biggers, 409 U.S. 188, 193, n.3 (1972); (4) conclude that the method of electing the Escambia County Board of Commissioners results in racial discrimination in voting in violation of §2; and, (5) affirm the judgment below.

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*We wish to thank Elizabeth Brinkman, a law student at Yale University, for her contribution to this brief.

APPENDIX A

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973:

> Sec. 2.
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to

office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.